(3)

No. 94-1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,
v.
TOWN OF HARRISON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Maine Supreme Judicial Court

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PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES

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PETITIONER'S REPLY MEMORANDUM

In opposing the grant of *certiorari*, respondents advance arguments, several of them new, that not only are meritless but that are also revealing, for they foretell the use to which the decision below can be put if left standing: the broad exposure of non-profit organizations serving out-of-state residents to tax discrimination by states and localities.[1]

1. Respondents agree that the decision of the Law Court turned upon the difference it perceived between non-profit and for-profit organizations:

> "The purpose and effect of tax exemptions for non-profit *vis-a-vis* for-profit organizations is of key importance. The purpose of granting exemptions to charitable organizations . . . is to allow the organiza-

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[1] Though served with the Petition for Certiorari upon its filing, the state has not sought to intervene, just as it did not appeal the judgment of the Superior Court to the Law Court.

> tion to devote its financial resources to its charitable goals. The effect is to promote the 'good' being done by the charity. This was explicitly recognized by the Law Court in this case . . . ." Opp. p. 9.

It is on this basis, respondents maintain, that the "strictest scrutiny" rule of the line of cases summarized in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992), was properly set aside by the Law Court. The argument, we take it, is that, assuming the statute facially discriminates against interstate commerce, it is nonetheless saved from "strictest scrutiny"—and ultimately saved under any test—by its high purpose.

It is quite true, as respondents aver and as we noted in our Petition (p. 13), that no dormant Commerce Clause decision of this Court has involved non-profit organizations. But neither is there basis in any of the opinions in those cases, in any opinion of any other court so far as we know, or in reason, for conferring Commerce Clause blessing upon tax discriminations designed to promote the recreation of residents while condemning like discriminations designed to promote their economic welfare. If such a radical departure from precedent is not so plainly wrong as to merit summary reversal, as we submit it is, at the least it should not be passed by without plenary review.[2]

2. Next, while respondents acknowledge that "Camps chooses to operate in a manner that promotes interstate travel" (Opp. p. 17), they nevertheless insist that "[n]o

[2] In a related argument, respondents assert, again without support in precedent or policy, that the fact that the exemption at issue relates to a property tax rather than to an excise or sales tax should also preclude application of the *Chemical Waste* test. The reason assigned is that "[w]hen property is taken off the property list by way of exemption, the remaining taxable property must be taxed at a higher rate in order to meet the budgeted revenue goal." Opp. pp. 9-10. We do not suppose respondents mean to suggest that the revenue lost by way of exemptions from excise or sales taxes somehow need not be made up. But we do not discern what else respondents' point might be.

impact on interstate travel was demonstrated on the record" (Opp. p. 11).

But respondents do not deny that the statute's impact is self-evident in terms of increasing the costs, diminishing the services, or inducing the restriction of out-of-state enrollment of organizations serving non-residents, whether the organizations be camps, nursing homes, boarding care facilities, or any other type of "benevolent and charitable institution." Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1). (As to petitioner, as we have noted, the actual dollar impact—about $20,000 a year—is established in the record. Pet. p. 3.)

As this Court's decisions cited in our Petition—and not discussed by respondents—show, this is quite enough, at least where the discrimination is palpable. See Pet. pp. 4, 11 & n.27. See also *New Energy Co.* v. *Limbach*, 486 U.S. 269, 276 (1988) ("Our cases . . . indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 269 (1984) (Both "the small volume of sales of exempted liquor" and "the fact that the exempted liquors do not constitute a present 'competitive threat' to other liquors" "go only to the extent of such competition." But "[i]t is well settled that '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.' *Maryland* v. *Louisiana*, 451 U.S. 725, 760 (1981).").

3. Respondents devote the balance of their discussion of the impact on interstate commerce question to an analysis of *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), that quite misses the point. Opp. pp. 11-12. It is of course true that neither that decision nor any other stands for the proposition that a subject that is within the power of Congress under the Commerce Clause is by that token beyond the power of the States.

Opp. pp. 11-12. *Heart of Atlanta Motel* is relevant here because it confirmed that, as respondents do not dispute, interstate travel is an ingredient of commerce within the Commerce Clause. While the issue there was the power of Congress and not that of the States, it is established, as we have noted, that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation," *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979). This simply means, not that the states are powerless to take action that affects interstate travel, but that they may not take action that affects it in a discriminatory fashion.

4. Respondent's last argument is that "[e]ven if the strictest scrutiny test is applied, the exemption statute passes muster." Opp. p. 14. The "strictest scrutiny" test governs, under the *Chemical Waste Management, Inc.* line of decisions, where the statute "facially discriminates" against interstate commerce. 504 U.S. 342-44; Pet. p. 8.[3] In arguing that the Maine statute survives even "strictest scrutiny," respondent relies upon a recent decision of this Court in which that test was *not* applied because, as Mr. Justice Scalia explicitly noted as the basis for his concurrence, the Court concluded that "Oklahoma's sales tax does not facially discriminate against interstate com-

[3] Respondents unaccountably assert that we argue "the Law Court . . . should have employed the four part test first laid down by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977)." Opp. p. 14. We did not even *cite Complete Auto*, which did not involve a statute discriminatory on its face, in which the Court did not refer to a strict scrutiny or comparable test, and in which the statute was upheld. Nor did the Law Court. While the Superior Court did look to the discrimination element of the *Complete Auto* analysis, its application of the "per se rule of invalidity" was based upon *Chemical Waste Management* and like authorities. See Pet. App. B pp. 16a-19a. For an accurate statement of our position, see the footnote respondents append to this erroneous text: "Camps actually discusses the use of the test in *Chemical Waste Management, supra*. . . ." Opp. p. 14 n.6.

merce." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1346 (1995). This decision, thus, can be added to a host of other dormant Commerce Clause cases that are not pertinent here. A ruling that a sales tax that applies equally to all bus ticket purchases, whether for solely intrastate or partly interstate travel, does not facially discriminate teaches nothing with respect to a tax exemption that is denied only to organizations that serve primarily non-residents.

In seeking to justify the statute under the "strictest scrutiny test," respondents also advance an argument that could perhaps better be viewed as a contention that the test doesn't apply at all because the provision does not facially discriminate. Thus, respondents assert that the application of the statute "does not turn on whether there is a potential for, or there in fact is, interstate movement of campers," but rather "upon the residence of the beneficiaries." Opp. pp. 16-17. To show that the statute could conceivably apply in the absence of interstate travel, respondents postulate a hypothetical nonprofit with headquarters in, but operations outside, the State.

But the statute was upheld as applied to petitioner, and respondents of course do not suggest that petitioner's nonresident campers do not come from other states. The argument is meritless in any event. It doubtless never occurred to the legislature to so truncate the provision that it would apply only where the services are performed outside the state, since that would have quite defeated the legislative purpose, whether that purpose be what appears to be the real one—raising revenue—or the conjectural one—benefitting only organizations serving residents.

Where a tax burden will, both in fact and in legislative contemplation, fall only upon interstate commerce in all but the most fanciful instances, there is facial discrimination in all but the most strained sense. In any case, whatever the formulation, there is the sort of discrimination

that is impermissible, at least absent a powerful justification. "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects. See *Hughes* v. *Oklahoma*, 441 U.S., at 336; *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980). For decisions in which statutes discriminating against interstate commerce were struck down though their impact, in fact and not just in theory, was not confined to such commerce, see, *e.g.*, *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 361 (1992), and *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 & n.4 (1951).

5. Finally, while evidently agreeing that the decision in this case sanctions, for the first time so far as the parties or the lower courts have been able to discover, differential state taxation of non-profit organizations serving non-residents, respondents maintain that the decision will have little practical effect. They observe, first, that there has not been "a stampede of states and municipalities enacting similar legislation" since the 1963 decision initially upholding this statute, *Green Acre Baha'i Institute* v. *Town of Eliot*, 159 Me. 395, 193 A.2d 564 (1963). Opp. p. 7. Next, they assert the relevance of the truism that "states are free to deny property tax exemptions to all nonprofit organizations." *Id.*

But *Green Acre* did not sustain the statute against the most obvious objection, the Commerce Clause; a denial of *certiorari* would give greatly increased currency to the Law Court's decision; the drive to curtail tax exemptions is recent and gaining force (see Pet. pp. 12-13); and, given freedom to do so, state and local taxing authorities are much more likely to balance fiscal and political needs by catering to local interests and imposing burdens on "foreign" interests than to engage in across-the-board repeal of long-established exemptions. It is precisely the

purpose of the Commerce Clause to brake that predictable, parochial bent of local political systems.

Respectfully submitted,

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